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(37898)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 901

JOEY GOLD and NEW YORK TICKET BROKERS, INC., on behalf of itself and its members,

Appellants,

—against—

JOSEPH C. DICARLO, as Commissioner of Licenses of the City of New York, and LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

LEO A. LARKIN
Corporation Counsel
Attorney for Joseph C. DiCarlo, etc.
Appellee

SEYMOUR B. QUEL
of Counsel.

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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Appellees.

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, defendant-appellee Joseph C. DiCarlo, Commissioner of Licenses of the City of New York, moves that the judgment of the District Court be affirmed.

Statement

This is a direct appeal from an order entered on November 20, 1964, by a three-judge District Court dismissing the complaint. The opinion of the District Court is reported in 235 F. Supp. 817 and is set forth in Appendix A of the Jurisdictional Statement.

The action was brought to have declared unconstitutional § 169-c of the General Business Law of New York. That statute, set forth in Appendix B of the Jurisdictional Statement, provides that it shall be unlawful to resell a ticket

to a public amusement event at a price more than $1.50, plus taxes, in excess of the price printed on the face of the ticket. The effect of the statute is to limit the brokerage charge for tickets to $1.50.

The Decision Below

The opinion of the three-judge District Court, per KAUFMAN, C.J., held that § 169-c was within the power of the New York Legislature and that the means chosen to effect the legislative purpose—the regulation of broker's resale prices—was reasonable and constitutional.

Tyson & Brother v. *Banton*, 273 U.S. 418 (1927) held unconstitutional an earlier New York statute (old § 172 of the General Business Law) limiting the premium for resale of tickets to fifty cents on the ground that the state lacked power to regulate resale prices of theatre and sports tickets because they were not deemed by the Court to be matters "affected with a public interest." However, the test laid down in *Tyson* was rejected in *Nebbia* v. *New York*, 291 U.S. 502 (1934), which sustained a State statute fixing the minimum and maximum retail prices of milk; and *Olsen* v. *Nebraska*, 313 U.S. 236 (1941), which upheld a statute regulating fees of employment agencies; and in *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963) the opinion of Justice BLACK stated that *Tyson's* philosophy had been abandoned. Under the circumstances, the District Court held that *Tyson* was no longer a binding precedent and was not *res judicata* as to the issues here involved.

Considering the merits of the controversy apart from *Tyson*, the Court held that the method of regulation chosen by the Legislature was reasonably related to the expressed legislative purpose and should be upheld.

ARGUMENT

The appellant urges that *Tyson* has never been overruled, while conceding "that since that decision in 1927, the doctrine upon which it was based has been substantially eroded and that this Court in recent years has redefined the limitations on the power of a state to fix prices and regulate business to such an extent that few such restrictions remain." (Jurisdictional Statement, p. 7). Nevertheless, the appellants urge, *Tyson* should not be overruled with respect to the situation for which it was written.

We submit that this argument is without merit. If the rationale of *Tyson* no longer applies, there is no reason why its result should be continued with respect to another different, albeit similar, statute. The statute involved in *Tyson* was § 172 of the General Business Law which imposed a limitation of fifty cents on the premiums chargeable by ticket brokers. The limitation as to the amount of premium was repealed subsequent to the *Tyson* decision and the statute was renumbered as § 169-c (L. 1928, ch. 600). Section 169-c was amended in 1940 (L. 1940, ch. 614) so as to provide for a maximum brokerage charge of seventy-five cents. The statute was amended several times to increase the maximum brokerage fee. The last amendment imposed the present maximum of $1.50 (L. 1960, ch. 902). The validity of § 169-c has been upheld in two state court decisions *Kelly-Sullivan* v. *Moss*, 174 Misc. 1098, 22 N.Y.S. 2d 491 (1940), aff'd 260 App. Div. 921, 24 N.Y.S. 2d 984 (1st Dept., 1940) and *Kelly-Sullivan, Inc.* v. *Moss*, 180 Misc. 3, 39 N.Y.S. 2d 797 (1943). The fact that the present statute has not been challenged for over twenty years and ticket brokers have continued to operate thereunder distinguishes this case

from the baseball situation involved in *Toolson* v. *New York Yankees*, 346 U.S. 356 (1953), relied upon by appellants (Jurisdictional Statement, pp. 7-8).

The appellants further urge that § 169-c is not reasonably designed to achieve the expressed legislative purpose of controlling prices to be paid for tickets since it limits the permissible charges by brokers but does not impose any limitation on the box-office prices which may be fixed by theatrical producers or sports promoters.

The answer to the foregoing contention is that § 169-c is not rendered invalid merely because it does not attempt to regulate every aspect of ticket selling. *Goessert* v. *Cleary*, 335 U.S. 464 (1948); *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 661 (1923).

Ticket brokers are a recognizable class which may reasonably be distinguished from other groups engaged in the theatrical or sports industry, such as producers, promoters, etc. Section 169-c applies alike to all ticket brokers. The prices charged by ticket brokers obviously bear some relationship to the ultimate price paid by the public for tickets and the regulation of brokerage charges thus bears a relationship to the expressed legislative interest in "the price of or charge for admission to theatres, places of amusement or entertainment" (§ 167 of General Business Law, Jurisdictional Statement, p. 24). Whether the particular method adopted by the Legislature is the one best designed to meet the evil sought to be curbed is not a question open for judicial review.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The order of the three-judge District Court should be affirmed.

March 4, 1965

Respectfully submitted,

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